

ADMINISTRATIVE APPEALS OF  
THUNDERBIRD THEATER COMPANY, INC.  
SELOM F. AND MARIAN T. BURNS  
SHELL OIL COMPANY

v.

COMMISSIONER, BUREAU OF INDIAN AFFAIRS, ET AL.

IBIA 77-4-A (Thunderbird)  
IBIA 77-5-A (Burns)  
IBIA 77-1-A (Shell)

Decided November 29, 1977

Appeals from a decision of the Commissioner, Bureau of Indian Affairs, affirming an Acting Area Director's and a Superintendent's interpretation of gross receipts under a business lease.

Reversed.

1. Indian Lands: Leases and Permits: Long-term Business: Generally

If definition of gross receipts and other pertinent lease provisions governing rental consideration are unambiguous the plain terms must control. Otherwise, resort may be had to rules of construction and relevant parol evidence to assist in ascertaining the intentions of the parties.

APPEARANCES: William F. Ingram and Douglas L. Bell of Bell, Ingram and Rice, attorneys for Thunderbird Theater Company, Inc.; Edward K. Novack of Williams, Novack and Hansen, attorneys for Selom F. and Marian T. Burns; William A. Taylor of Elvidge, Veblen, Tewell, Bergman, and Taylor, attorneys for Shell Oil Company; and, James R. Kuhn, Jr., Office of the Regional Solicitor, Portland, Oregon, for Commissioner, Bureau of Indian Affairs, et al.

IBIA 77-4-A (Thunderbird)  
IBIA 77-5-A (Burns)  
IBIA 77-1-A (Shell)

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

Three separate appeals were filed in the above-entitled matter by Thunderbird Theater Company, Inc., lessee under Lease No. 5071, Contract No. 14-20-0510-31, and its sublessees Selom F. and Marian T. Burns, and Shell Oil Company.

The Board of Indian Appeals referred the appeals to the Hearings Division, Office of Hearings and Appeals, for a fact-finding hearing and recommended decision on March 24, 1977, because of a dispute concerning the interpretation of certain rental provisions in the lease. Thereafter, on May 4, 1977, the matter was heard by Chief Administrative Law Judge L. K. Luoma at Seattle, Washington, with parties appearing as above indicated.

From the evidence adduced at the hearing, Judge Luoma issued a recommended decision on August 25, 1977. All parties were allowed 30 days from the receipt of the recommended decision in which to file exceptions thereto. Only the Bureau of Indian Affairs filed exceptions, contending that the recommended decision (1) fails to follow the mandate of the Interior Board of Indian Appeals, and (2) ignores the evidence presented at the hearing.

We find no merit in the Bureau of Indian Affairs' exceptions to the recommended decision in that a hearing was held as directed and testimony was permitted to be presented regarding the disputed provisions of the lease. Based on the evidence presented at the hearing the Judge made his findings and recommendations.

Background information concerning the appeals and the contentions of the parties involved is set forth in the recommended decision of August 25, 1977, and needs no repeating herein.

Consideration has been given to the record, consisting among other things, of briefs, exhibits, and testimony of the witnesses.

We are in agreement with the Judge's findings and recommendations of August 25, 1977, a copy of which is attached and made a part of this decision. Accordingly, the Judge's recommended decision of August 25, 1977, should be adopted and the Commissioner's decision of August 27, 1976, affirming the Area Director's and the Superintendent's decisions, should be reversed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended decision of August 25, 1977, is ADOPTED, and the decision of the Commissioner, Bureau of Indian Affairs, dated August 27, 1976, is hereby REVERSED.

IBIA 77-4-A (Thunderbird)  
IBIA 77-5-2 (Burns)  
IBIA 77-1-A (Shell)

This decision is final for the department.

Done at Arlington, Virginia.

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Alexander H. Wilson  
Chief Administrative Judge

We concur:

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Mitchell J. Sabagh  
Administrative Judge

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Wm. Philip Horton  
Administrative Judge

Attachment

United States Department of the Interior  
Office of Hearings and Appeals  
Hearings Division  
4015 Wilson Boulevard  
Arlington, Virginia 22203

Aug 25, 1977

ADMINISTRATIVE APPEALS OF:	:	Lease No. 5071
	:	
THUNDERBIRD THEATRE COMPANY,	:	
INC.	:	IBIA 77-4-A
	:	
SHELL OIL COMPANY	:	IBIA 77-1-A
	:	
SELOM F. AND MARIAN T. BURNS	:	IBIA 77-5-A
Appellants	:	
	:	
v.	:	
	:	
COMMISSIONER, BUREAU OF INDIAN,	:	
AFFAIRS, <u>ET AL.</u>	:	

RECOMMENDED DECISION

Appearances: William F. Ingram, Esq., and Douglas L. Bell, Esq., Bell, Ingram & Rice, Everett, Washington, for Thunderbird Theatre Company, Inc;  
William A. Taylor, Esq., Elvidge, Veblen, Tewell, Bergman & Taylor, Seattle, Washington, for Shell Oil Company;  
Edward J. Novack, Esq., Williams, Novack and Hanson, Everett, Washington, for Selom F. and Marian T. Burns;  
and James R. Kuhn, Jr., Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for Commissioner, Bureau of Indian Affairs, et al.

Before: Chief Administrative Law Judge Luoma

Background

These proceedings, brought under the authority of 43 CFR §§ 4.350-4.369 and 25 CFR § 131.1 et seq., are appeals to the Interior Board of Indian Appeals (Board), from a decision of the Commissioner of Indian Affairs, dated August 27, 1976, 1/

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1/ The Commissioner apparently ruled only on the Burns' appeal. Under applicable regulations, however (43 CFR 4.353), any interested party adversely affected may appeal.

affirming prior rulings of the Superintendent of the Bureau of Indian Affairs' (BIA) Western Washington Agency, dated July 18, 1975, and BIA's Acting Area Director in Portland, Oregon, dated April 20, 1976. By order of March 24, 1977, the Board referred these cases here for a fact finding hearing and recommended decision, in order to resolve the following issues: Whether disputed rental provisions of the subject lease ("master lease;" Exhibit A) between Indian owner Edward Sam (lessor) and the president of Thunderbird Theatre Company, Inc. (Thunderbird), Edward Villella (lessee), are ambiguous, and if so, how they should be resolved.

A hearing in the matter was held in Seattle, Washington, on May 4, 1977. The interests of lessor Sam were represented by counsel appearing on behalf of the Commissioner of BIA. Also represented were lessee Thunderbird, and two of its sublessees, Shell Oil Company (Shell) and Selom F. and Marian T. Burns (Burns). BIA presented one witness, Clarence Saub, who at all times here pertinent worked on development leases, including the master lease herein, in BIA's Portland office (Tr. 33-100). Thunderbird presented one witness, William F. Ingram, who was also the attorney representing Thunderbird herein, and who was questioned by his co-counsel (Tr. 103-139). All parties were afforded the opportunity to file posthearing briefs, and all parties, except Burns, availed themselves of that opportunity.

#### Issues

The issues are whether the disputed rental provisions of lease number 5071 are ambiguous, and, if so, how such ambiguity should be resolved?

#### Discussion, Findings and Conclusions

The substance of these actions concerns the May 26, 1969 lease of two parcels of allotted Tulalip Indian land, located in Snohomish County, Washington, to Thunderbird, a closely held corporation owned by Edward Villella. The controversy focuses upon provisions of this so-called "master lease" governing the computation of rental due to the lessor, Sam, and in particular, upon the following definition of "gross receipts," excerpted verbatim from the lease:

"Gross receipts" shall mean all income computed on the "cash basis", including money and any other thing of value, received by or paid to Lessee or its affiliates, whether individuals, corporations, partnerships, or other legal entity, or received by or paid to others for Lessee's or its affiliate's use and benefit and which is derived from business done, sales made or services rendered directly or indirectly from or on

the leased premises, whether conducted by Lessee, sublessees, or assigns, or derived from the subleasing, subrenting, permitting, contracting or other use of the leased premises or any portion thereof. All income accruing from credit transactions shall be treated as "gross receipts" as of the date credit is extended. "Gross receipts" shall include any ad valorem taxes paid by other than the Lessee for the account of the Lessee.

Article 4 of the lease provides for a total rental consideration of 3 percent of the first \$100,000 of "gross receipts," so defined, one-half percent of all gross receipts in excess of \$100,000; and a guaranteed-minimum annual rental of \$10,000 for the first 5 years of the lease, \$15,500 for the succeeding 10 years, and an amount to be ascertained upon review thereafter.

The present dispute originated with a ruling by BIA's Western Washington Agency Superintendent on July 18, 1975, notifying Thunderbird that it was in breach of master lease 5071, contract number 14-20-0510-301, for failure to make available the books and records of its sublessees for examination and audit pursuant to the provisions of Article 5 of the master lease. This ruling derived from the intention of BIA to include in the computation of "gross receipts" under Article 4, all income received by Thunderbird's sublessees, whether or not such income was received by the lessee or paid to others for its benefit; that is, all income which derived from use of the leased premises. Thunderbird, contending that the lease definition of gross receipts excludes income not meeting the dual tests of benefit to lessee and derivation from leased premises unsuccessfully appealed the Superintendent's ruling to BIA's Acting Area Director, and next to the Commissioner of Indian Affairs. Thunderbird's subsequent appeal to the Board resulted in these matters being referred here in order to resolve the aforescribed issues.

[1] It is the primary purpose of these proceedings to determine whether the master lease definition of "gross receipts" is ambiguous; that is, whether the definition is reasonably capable of being understood in more than one sense, applying the ordinary meaning of the language used therein. 2/ If said definition and

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2/ See Whiting Stoker Co. v. Chicago Stoker Corp., 171 F.2d 248 (7th Cir. 1948), cert. den., 337 U.S. 915 (1949); Dipo v. Ringsby Truck Lines, 282 F.2d 126 (10th Cir. 1960); Blume v. Bohanna, 38 Wash. 2d 199, 228 P.2d 146 (1951), and Pine Corp. v. Richardson, 12 Wash. App. 459, 530 P.2d 696 (1975).

other pertinent lease provisions governing rental consideration are unambiguous, then the plain terms must control, and no antecedent negotiations or agreements should here be considered to vary, explain or elaborate that clear integration. If, however, the definition and rental terms are ambiguous, then resort may be had to rules of construction and relevant parol evidence to assist in ascertaining the intentions of the principal parties. 3/

While each of the principal parties apparently avers that the lease language defining "gross receipts" is unambiguous (Tr. 14, 22, 25), each also contends for its own contrary understanding. This lack of accord, however, does not itself establish ambiguity, 4/ and careful scrutiny of the language employed is called for to test its susceptibility to such varying understandings.

The key language of the lease definition of "gross receipts" is the declaration of limitation of its source; to wit, all income received by or paid to lessee (Thunderbird), or its affiliates, or received by or paid to others for lessee's or its affiliate's use and benefit. Counsel for BIA relies upon the succeeding clause of the lease language, as clearly including "'all income' which 'is derived from business done' whether such business was 'conducted by Lessee, sublessees, or assigns,' or derived from sub-leasing, subrenting, permitting or contracting." 5/ The foregoing language, however, is preceded by the phrase "and which is derived from," clearly modifying the earlier declaration of source. The language upon which BIA places its reliance, chosen in open, partisan, arms-length negotiations between individuals experienced in drafting development leases of Indian trust lands, cannot reasonably be understood as creating a separate category of income to be included in "gross receipts," that is, income from business done on the premises by sublessees et al. However inartfully drafted, the quoted language upon which BIA relies clearly limits and modifies the prior inclusion of all income received by lessee or paid to others for its benefit, providing that such income is included only if it derives from business done, sales made or services rendered on the leased premises. This conclusion is substantiated by the lack of any punctuation between the phrases "or its affiliate's use and benefit" and "and which is derived

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3/ See Bradley v. S. S. Kresge Co., 214 F.2d 692 (7th Cir. 1974); Finch v. King Solomon Lodge No. 60, 40 Wash. 2d 440, 243 P.2d 645 (1952); and Pine Corp., Id.

4/ See Whiting at 250-251; Cole v. Ross Coal Co., 150 F. Supp. 808, 811 (1957), aff'd., 249 F.2d 600 (1957).

5/ Brief of Appellee at 3.

from," and by choice of the word "and" rather than "or" in the latter phrase. These elements both contribute to a reading of the disputed phrase, "and which is derived from," as "and which (income) is derived from," rather than "and (income) which is derived from." Thus, the clause following said phrase clearly modifies the earlier declaration of source, as follows: "'Gross receipts' shall mean all income \* \* \* received by or paid to Lessee or its affiliates \* \* \*, or received by or paid to others for Lessee's or its affiliate's use and benefit and which [income] is derived from \* \* \* the leased premises \* \* \*." Only this interpretation of the pertinent lease language comports with an ordinary, reasonable understanding of the words and syntax chosen by the parties, and in the absence of any evidence of fraud, coercion, or unfair bargaining power, I decline to infer a contrary intent.

I find that the clear and unambiguous sense of the disputed lease provision defining "gross receipts" means all income, including money and any other value, received by or paid to lessee or received by or paid to others for lessee's use and benefit, and additionally deriving from use of the leased premises. Language in the master lease pertaining to how the "money and any other thing of value" is derived is pertinent only if it is first shown to have inured to the benefit of Thunderbird. Income generated on the leased premises by sublessees Shell Oil Company and Burns, except insofar as it contributes to the sources of sublease rental payments, is not received by or paid to Thunderbird or an affiliate, and is not received by or paid to others for the use or benefit of Thunderbird or an affiliate, and therefore said income is not "gross receipts" within the meaning of the foregoing definition. 6/

BIA contends that according to rules of contractual construction, all parts of a contract should be given effect, if possible. The foregoing understanding of the lease language defining "gross receipts," BIA suggests, is inconsistent with a subsequent lease

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6/ In *Administrative Appeal of Palm Patencio Company, Inc. v. Winifred Patencio Preckwinkle*, 5 IBIA 37 (March 2, 1976), the Interior Board of Indian Appeals, in holding that the definition of "gross receipts" in a development lease of allotted Indian lands, which was almost identical to the definition here at issue, was "clear and unambiguous," stated that "in the absence of any qualifications, the plain and ordinary construction or meaning of the term 'gross receipts' as contained in the lease must be given." *Id.* at 38.



provision providing for audit of business conducted on the leased premises. 7/ It is BIA's apparent position that this latter provision enables the lessor to monitor the income of sublessees so that such income may then be accurately included in the computation of gross receipt. An alternate, reasonable interpretation of the audit provision of the master lease, however, is that the audit of sublessee's books is called for to enable the lessor to monitor any expenditures received by or paid to others by sub-lessees for the "use and benefit" of Thunderbird. This interpretation accords with the foregoing understanding of "gross receipts," and harmonizes any alleged inconsistencies with the lease language governing rental consideration.

BIA further contends that only its interpretation of the lease definition of "gross receipts" comports with regulatory requirements contained in 25 CFR 131.5(b) and 131.8, which provide, in pertinent part, as follows:

§ 131.5 Special requirements and provisions.

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(a) Except as otherwise provided in this part no lease shall be approved or granted at less than the present fair annual rental.

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7/ Exhibit A, Article 5, which provides in pertinent part, as follows:

"The Lessee shall, not later than ninety (90) days after each successive anniversary of the beginning date of the term of this lease, which shall be the end of the fiscal year of this lease, submit to Lessor and the Secretary, certified statements of gross receipts. Said statements shall be prepared by a Certified Public Accountant, licensed in the State of Washington, in conformity with standard accounting procedures. Any duly authorized representative of the United States Government, or any qualified accountant, agent, or agents appointed by the Lessor, shall have access to and the right to examine and audit any pertinent books, documents, papers, and records of the Lessee and Lessee's tenants relating to this lease during the normal business hours of any working day, provided that written notice has been received by the Lessee twenty-four hours in advance of said examination specifying the hour and day when said examination is to be made. Lessee shall insert a similar provision in all subleases pertaining to this right and shall make available to said representative, agent, or agents all books and records of Lessee's tenant which may be requested or may be necessary for completion of a full audit of all business conducted on the leased premises."

§ 131.8 Duration of leases.

Leases granted or approved under this part shall be limited to the minimum duration, commensurate with the purpose of the lease, that will allow the highest economic return to the owner consistent with prudent management and conservation practices, and except as otherwise provided in this part shall not exceed the number of years provided for in this section. Except for those leases authorized by § 131.5(b)(1) and (2), unless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review at not less than five-year intervals, of the equities involved. Such review shall give consideration to the economic conditions at the time exclusive of improvement or development required by the contract or the contribution value of such improvements. Any adjustments of rental resulting from such review may be made by the Secretary where he has the authority to grant leases, otherwise the adjustment must be made with the written concurrence of the owners and the approval of the Secretary. [Emphasis added.]

According to BIA, because the minimum guaranteed rental consideration was below fair market value and because the lease failed to provide for "periodic review at not less than 5-year intervals," 8/ the subject lease was necessarily "based primarily on percentages of income produced by the land;" that is, based upon all income deriving from use of the leased premises, including that of sublessees. This bootstrap reasoning, however, ignores the plain sense of the language voluntarily-adopted by mutual consent of the parties, and that language must stand on its own merits. Further, the language of 25 CFR 131.8, emphasized above, does not refer to all income produced by the land, and the definition of "gross receipts" as that income produced by the leased premises which flows to the benefit of Thunderbird, does not adversely affect BIA's adherence to the quoted regulations with respect to its participation in the present lease.

In sum, I find that the rental consideration in lease number 5071 consists of a total of a guaranteed minimum annual rental of \$10,000 for the first 5 years, \$15,500 for the next 10 years, and an amount to be ascertained upon review thereafter, plus 3 percent of the first \$100,000 of gross receipts and one-half percent of all gross receipts above \$100,000; that the unambiguous essential meaning of "gross receipts" for purposes of said rental formula, using the ordinary and reasonable understanding of the language used in master lease number 5071, is all income received

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8/ See Exhibit A, Article 6 (rental adjustment).

by or paid to lessee or received by or paid to others for lessee's use and benefit, and which income additionally derives from use of the leased premises; that income of sublessees, leasing portions of the leased premises from Thunderbird, is not "gross receipts" when such income is not received by or paid to lessee or received by or paid to others for lessee's use and benefit; that this result engenders no inconsistency with either audit provisions of the master lease or regulatory guidelines contained in 25 CFR Part 131.

### ORDER

It is ORDERED:

1. that the administrative appeals of Thunderbird Theatre Company, Inc., Shell Oil Company, and Selom F. and Marian T. Burns from a decision of the Commissioner of Indian Affairs, dated August 27, 1976, affirming prior rulings of the Superintendent of BIA's Western Washington Agency, dated July 18, 1975, and BIA's Acting Area Director in Portland, Oregon, dated April 20, 1976, be GRANTED; and

2. that said decisions of the Commissioner, Acting Area Director, and Superintendent, be REVERSED.

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L. K. Luoma  
Chief Administrative Law Judge